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Supreme Court of the United States

October Term, 1966

No. 118

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,
Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,
Respondents.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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1. After the filing of the petition for writ of certiorari in this case the Court granted a petition for writ of certiorari in *Pierson* v. *Ray*, # 1074, 1155 October Term, 1965 U. S. , (May 16, 1966, 86 S. Ct. 1457). In *Pierson* the Court has now accepted for review certain important and substantial questions relating to the impact of the doctrine of immunity upon suits for damages brought under the Civil Rights Acts. These questions are similar to the important issues raised in the present petition. We respectfully suggest that the same considerations which led to the granting of certiorari in *Pierson* call for the granting of the petition here. The Court may desire to set this cause for argument together with *Pierson*.

2. In addition to these issues of importance involved in both *Pierson* and the present petition, aspects of the impact of the immunity doctrine upon civil rights damage actions are presented uniquely in this petition which ought to be considered by the Court together with the questions raised in *Pierson*. Consideration of the questions presented in this petition would thus bring to the Court, in addition to the *Pierson* issues, critical questions relating to the scope and extent of both legislative and executive immunity to civil rights damage actions.

3. The respondents in their Answer to the Petition seek to avoid acknowledging that this case raises fundamental questions of the scope and extent of the immunity doctrine. Thus their formulation of the questions presented inexplicably omits the issue of immunity deemed determinative by the Court of Appeals and suggests rather that the question is really whether summary judgment for the respondents was proper where the "affidavits showed that they [the respondents] did not participate in the conspiracy". Brief for Respondents in Opposition p. 2.* But the respondents fail to account for the fact that the Court of Appeals has already adversely disposed of this contention and has held that with regard to respondents' charged participation in the conspiracy, in the absence of considerations of "legislative immunity . . . we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" (Pet. App. 5a).

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* Respondents also suggest as a second question presented the propriety of denying injunctive relief on the ground that such relief would be "ineffective" under the doctrine of this Court's opinion in *Virginia Railway* v. *System Federation No. 40*, 300 U. S. 515 (1937). As we have pointed out in the petition under *Virginia Railway* equitable considerations of futility come into play only after a hearing which discloses the "special circumstances of each case", 330 U. S. at 551. Not only was no hearing held on the request for equitable relief, but the matter was disposed of summarily by the district judge on unilateral assertions by the respondents.

Respondents' only acknowledgment of the clear opinion of the Court of Appeals, that this record presents disputed issues of fact "requiring exploration and resolution by means of a trial," appears in a footnote to their Answer. Respondents Brief in Opposition, footnote 4, pp. 10, 11. In order to avoid conceding that this case raises fundamental issues of the scope of legislative immunity, respondents would inferentially ask this Court to wholly disregard the conclusion of the lower court that the questions of respondents' participation in the charged conspiracy "require resolution by means of a trial" (Pet. App. 5a). Even if this question were properly before the Court on this petition the extraordinary nature of the facts revealed in the record support beyond any possible question the conclusion of the Court of Appeals.*

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* The following facts emerge from the complaint, affidavits and depositions upon which the Court of Appeals based its decision that there were "disputed issues of fact requiring exploration and resolution by means of a trial":

(a) the meetings of Respondent Sourwine and Mr. Rogers, the Louisiana Committee counsel, in the summer of 1963, at which the records, lists and files of SCEF were discussed (Deposition of Sourwine, pp. 21-25).

(b) the illegal raids, searches and seizures on the afternoon of October 4th, 1963, conducted on warrants issued without probable cause in which Rogers and Pfister played a prominent role, and during which the very records, lists and files discussed in the summer meetings with Respondent Sourwine were illegally seized (18a, 19a, 20a. All references are to the printed joint appendix in the Court of Appeals and to the depositions on file in this case.)

(c) the close proximity in time between the illegal raids during which the records and files were seized and the phone call to Respondent Sourwine, sometime the evening of the same day, informing him that Rogers and Pfister now had the records and files in their possession (Deposition of Sourwine, p. 32).

(d) the issuance of purported subpoenas by the respondents for these illegally seized records and files on the very day of the illegal raids, October 4th. [Respondents contend this was a

4. The recent decision of this Court in *Gojack* v. *United States* — U. S. —, 86 S. Ct. 1689 (1966) further underscores the importance of the issues presented in this petition. Respondents seek to invoke the protective mantle of legislative immunity by relying upon the assertion that all of their conduct was immunized by the issuance of the subpoenas signed in blank of October 4th and respondent Eastland's activity in directing the midnight removal of the seized property on October 24th. However, the respondents now concede, Respondents' Brief, at p. 8, that "the subpoena directed to petitioners' property—and the removal of that property from Louisiana to Washington—had not been authorized by the Subcommittee". But this Court has only recently held in *Gojack*, "No committee of either the House or Senate, *and no Senator and no Representative is free on its or his own to conduct investigations unless authorized*" 86 S. Ct.

"secretarial error" and that the subpoenas should have read "October 5th".] (35a, 36a) It is of some interest that all of the subpoenas made out by appellees bear the same "secretarial error", October 4th, on their face, as well as the letter sent by Respondent Sourwine to a Louisiana police official designating him as "Custodian" of the seized material (36a).

(e) the appearance of Respondent Sourwine in Baton Rouge, Louisiana, the morning after the illegal raids, prepared with blank subpoenas signed in advance by Respondent Eastland (35a, 36a).

(f) the failure of respondents to obtain Subcommittee authorization for these purported subpoenas or for their actions in Louisiana (35a, 36a).

(g) the telephone call of Respondent Eastland to Respondent Sourwine the night before the hearing scheduled in New Orleans, Louisiana, before Federal District Judge Ainsworth, instructing Sourwine to arrange to have the seized materials removed from Louisiana, and the subsequent telephone call from Respondent Sourwine to Louisiana officials sometime late Sunday evening to arrange the midnight transportation of the seized materials across the state boundaries to Woodville, Mississippi (29a).

(h) the letter of Senator Kenneth B. Keating to Respondent Eastland indicating that at least one member of the Subcommittee had no knowledge whatever of these activities (33a).

at p. 1698 (emphasis added). After the clear words of this court in *Gojack* it is impossible to support a contention that the acts of the respondents were "within the scope of [their] duties for the Senate Subcommittee", or "within the mainstream of legislative effort" [Pet. App. 6a, 7a].*

CONCLUSION

The petition for writ of certiorari ought to be granted and the judgments below reversed.

Respectfully submitted,

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* It is of some interest that respondents fail completely to explain why at a minimum Respondent Sourwine is not judicially accountable in the action for damages under this Court's decision in *Kilbourn* v. *Thompson*, 103 U. S. 168. See Petition, Point 7, Reasons for Granting the Writ, at p. 30.

Certificate of Service

I hereby certify that a copy of the foregoing Reply to Brief for Respondents in Opposition was mailed, by United States mail, postage prepaid, to the office of Honorable Thurgood Marshall, Solicitor-General; John W. Douglas, Assistant Attorney-General; David L. Rose and Martin Jacobs, Attorneys, U. S. Department of Justice, Washington, D. C. 20530, this 14th day of September, 1966.

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